FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

v.

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

SANA F. SHTASEL
PETER BARTON HUTT
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

JEFFREY S. BERLIN
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

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REPLY BRIEF FOR PETITIONER

In his brief, defendant urges this Court to adopt the extreme propositions (1) that *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), may never be applied beyond the contours of the Fourth Amendment,[1] and (2) that the Speech or

[1]That result was not suggested by the *Bivens* decision nor has it been adopted by an overwhelming number of lower federal courts. *See* list of cases collected in Br. for Petitioner at 20-23 & nn.15-17; Appendix 46-47 nn.3-4, 70-72 nn.6-8; Br. of the American Civil Liberties Union *Amicus Curiae* at 37-42; and Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials,* 4 Hastings Const. L. Q. 531, 567-68 n.229 (1977).

Debate Clause grants absolute immunity to a member of Congress for any conduct whatever and accordingly permits a member to discriminate against any congressional employee on the basis of sex. These propositions depend on standards that have never been articulated by this Court and that cannot withstand constitutional scrutiny.

I.

BIVENS COMPELS IMPLICATION OF A CAUSE OF ACTION FOR MONEY DAMAGES ON THE FACTS OF THIS CASE.

A. Defendant's Argument That *Bivens* Causes Of Action Must Be Limited to "Physical Intrusions" Or "Factual Contexts Involving Preconstitutional Notions Of Tort Law" Is Not Supported By The Rationale Of *Bivens* Itself.

Defendant argues that the *Bivens* decision turned on the principle that the United States potentially has far greater capacity to harm an individual than does a private person engaged in the same activity. Br. for Respondent at 10. He then urges that his alleged unconstitutional action was not different from any employment decision made in the private sector, and that the injury suffered by plaintiff was not sufficiently "amplified" to rise to the level of an intrusion cognizable under *Bivens*. Br. for Respondent at 10-11. This contention is similar to the view of the court below that, in order to warrant implication of a cause of action under the Fifth Amendment, the infringement of plaintiff's rights must somehow be as "direct" as was the injury to Bivens' Fourth Amendment rights. (A. 50.) Both positions are erroneous.

1. *Bivens* Decided That Violations Of Fourth Amendment Rights Give Rise To A Federal Cause Of Action For Money Damages And Was Not Limited To "Physical Intrusions."

Bivens turned on the nature of the right asserted. The issue was not whether a physical or nonphysical violation had occurred,[2] and the underlying consideration was not the magnitude of the harm done. Rather, the question decided in *Bivens* was "merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts." *Bivens, supra*, 403 U.S. at 397.

Defendant in essence would accord such a federal remedy only to those violations of constitutionally protected interests that would also give rise to a state tort claim, for it is state tort actions that traditionally have redressed injuries to individuals for physical invasions of person or property. Taken to its logical end, this argument renders violations not capable of enforcement in state court remediable nowhere. This turns *Bivens* completely on its head. It is also insupportable as a matter of policy.

This Court in *Bivens* refused to relegate that petitioner to a state tort action, even though one presumptively existed,

[2]Even in the context of the Fourth Amendment itself, the distinction between physical and nonphysical intrusions has long been discarded. Katz v. United States, 389 U.S. 347 (1967); Silverman v. United States, 365 U.S. 505 (1961). Those cases are cited in *Bivens*. 403 U.S. at 393-94. Under defendant's formulation of the *Bivens* rule, however, had Bivens' Fourth Amendment rights been violated by electronic surveillance rather than physical search, he would have had no implied cause of action under the Fourth Amendment.

and held that the Constitution gives rise to guarantees independent of any interests similarly protected by state law. 403 U.S. at 392-95. Typically, no state action exists to remedy violation of federal constitutional interests not involving physical restraint or injury to person or property. It would therefore be senseless to limit causes of action arising under the Constitution to those interests that happen to have a state common law analogue. It is precisely those interests not protected by statute or common law that require a constitutional cause of action.[3]

If the "potential for greater harm" had been a core element in *Bivens*, this Court would have limited *Bivens* causes of action to those Fourth Amendment violations where that potential had been realized. *Bivens* stands for no such principle.

There is simply no logic to defendant's argument that physical intrusions by federal officers or employees are the only acts whose consequences warrant the recognition of an implied constitutional cause of action. There is nothing inherent in the Fourth Amendment that makes the physical injury caused by its violation by federal agents necessarily greater than the injury resulting from similar activity by a private individual. Conversely, there may be federal actions of a nonphysical nature that violate a citizen's rights under other constitutional provisions and "possess a far greater capacity for harm" than would similar actions by a private

[3]Chief Justice Burger in his *Bivens* dissent acknowledged the necessity of a remedy for constitutional violations. "I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric . . ." *Bivens, supra*, 403 U.S. at 415 (Burger, C.J., dissenting). *See also* Note, *Remedies for Constitutional Torts: Special Factors Counselling Hesitation*, 9 Ind. L. Rev. 441 (1976).

citizen. The specter of elected lawmakers engaging in unconstitutional activity indeed has implications far beyond that of any individual engaged in analogous misconduct.

Constitutional rights cannot be so pigeonholed. The purpose of the Bill of Rights was to limit the power of the federal government. Recognition of a cause of action where limits have allegedly been exceeded does not depend on whether or not the intrusion is physical, on whether the harm is greater or less than that resulting from some similar private invasion, or on whether or not a state remedy would lie for a similar violation. Once plaintiff has demonstrated that her Fifth Amendment rights have been violated by a federal legislator, she should be "entitled to redress [her] injury through a particular remedial mechanism normally available in the federal courts." *Bivens, supra*, 403 U.S. at 397.

2. The Cause Of Action Recognized In *Bivens* Was Not Time-Limited In Any Respect.

As an alternative to his contention that *Bivens* applies only where there has been physical intrusion, defendant argues that *Bivens* causes of action arise only in "factual contexts involving preconstitutional notions of tort law." Br. for Respondent at 6, 12. Defendant cites no Supreme Court decision for this proposition — certainly none to *Bivens* itself is possible. *Bivens* spoke of remedies for violations of constitutional rights generally, not of remedies for preconstitutional torts. There is no sensible way to distinguish among constitutional rights, providing a federal remedy for injury to some and not others and thus deeming some more worthy of protection solely because of artificial time limitations.

Defendant concedes that the Constitution is a flexible document, which embraces "constantly expanding" notions of due process. Br. for Respondent at 12. He argues, however, that because the concept of sex discrimination in employment was likely not in the minds of the Framers, it does not now rise to a remediable wrong.[4] In support of this theory, defendant cites *Adair v. United States,* 208 U.S. 161 (1908), as embodiment of the Framers' conception of the employer/employee relationship. Br. for Respondent at 12. Defendant fails to note, however, that "[this Court's] course of decisions . . . since *Adair v. United States,* [*supra*], and *Coppage v. Kansas,* 236 U.S. 1 [1915], have completely sapped those cases of their authority." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 187 (1941) (citations omitted).[5]

The Constitution is not frozen in time.[6] Even notions of unconstitutional search and seizure, for example, have

[4]Defendant concedes, however, that discrimination based upon classification by sex is protected by the Fifth Amendment Due Process Clause. Br. for Respondent at 9 n.4.

[5]The demise of *Adair* and the cases it relied on, Lochner v. New York, 198 U.S. 45 (1905), and Allgeyer v. Louisiana, 165 U.S. 578 (1897), is not uninstructive. *Adair* held unconstitutional, as violative of the employer's Fifth Amendment rights, a provision of an 1898 interstate commerce act that prohibited discrimination in employment on the basis of union membership. Liberty of contract was the only right addressed. Nowhere were an individual employee's First Amendment rights considered. The subsequent discrediting of these and the entire line of cases holding similarly and relying on notions of substantive due process is evidence that concepts of constitutionality evolve and expand to accommodate the dictates of social change.

[6]*See, e.g.,* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring) ("Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring

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changed to reflect current needs, and the decision in *Bivens* was not limited to the Framers' vision of the Fourth Amendment. *See Bivens, supra,* 403 U.S. at 393-94 and n.2, *supra.* It is now well established that sex is one of the classifications granted equal protection scrutiny under the Fifth Amendment. *See* Br. for Petitioner at 11-12 and cases cited therein; n.4, *supra.* If this Court is willing to recognize that notions of constitutional rights expand to comport with the demands of contemporary society, then it should similarly recognize the existence of remedial mechanisms for violations of those same rights. Refusal to do so would turn those rights into meaningless rhetoric and extend a license to those who would violate them.

B. There Are No "Special Factors Counselling Hesitation" To Imply A *Bivens* Cause Of Action Here.

In deciding that a cause of action was implied under the Fourth Amendment, the *Bivens* Court noted that there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens, supra,* 403 U.S. at 396.[7] Neither was there an "explicit congressional declara-

(footnote continued from preceding page)
fundamental justice, it is also a living principle not confined to past instances."); Weems v. United States, 217 U.S. 349, 373 (1910) ("In the application of a constitution . . . our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. . . . Rights declared in words might be lost in reality.")

[7]Examples of the kind of "factors" the Court deemed relevant were those situations where the United States, as party plaintiff, had the power to create the liability sought to be inferred and those where no constitutional prohibition was involved. *Bivens, supra,* 403 U.S. at 396-97 (citing United States v. Standard Oil Co., 332 U.S. 301 (1947) and Wheeldin v. Wheeler, 373 U.S. 647 (1963)).

tion," short of "affirmative action," that persons injured as a consequence of Fourth Amendment violations by a federal officer might not recover money damages from the agent personally. *Bivens, supra,* 403 U.S. at 397. The *Bivens* Court suggested that such an "explicit declaration" might be a special factor counselling hesitation to imply a cause of action from the Constitution itself, but required in that case that the individual "must . . . be remitted to another remedy, equally effective in the view of Congress" *Id.*

Defendant urges that a number of "special factors" counsel hesitation to imply a cause of action from the Fifth Amendment in the instant case. Br. for Respondent at 13-23. These are not the kind of "special factors" with which *Bivens* was concerned. Rather, they speak to pragmatic and political considerations that cannot properly be balanced against plaintiff's Fifth Amendment rights. Moreover, under close examination, it is apparent that even on their own terms these arguments are lacking in merit.

1. Docket Considerations Cannot Justify Prohibiting Plaintiff From Redressing The Injury To Her Constitutional Rights. In Any Event, No New Floodgates Will Be Opened By Implying A *Bivens* Cause Of Action Here.

Judicial application of *Bivens* to constitutional amendments other than the Fourth has neither precipitated nor threatened the opening of "floodgates." As defendant acknowledges, every court of appeals has, in the six and one-half years since *Bivens* was decided, addressed the question whether *Bivens* applies to amendments other than the Fourth. Br. for Respondent at 14. Nine of these courts, as well as countless district courts, have held in the

affirmative.[8] No court of appeals, with the exception of the court below, has suggested that *Bivens* created an unmanageable workload; moreover, claims arising under constitutional causes of action have been regularly heard in the federal courts without unduly burdening the system.

Docket considerations may not be permitted to control access to the federal judiciary when constitutional rights are at stake. *See Bivens, supra,* 403 U.S. at 391 n.4; *id.* at 410-411 (Harlan, J. concurring); *Bell v. Hood,* 327 U.S. 678, 681-83 (1946).[9] If this Court denies plaintiff an implied cause of action, however, it will close the courthouse doors without justification not to a new flood of cases but rather to vindication of federal civil rights in those limited situations where statutory remedies do not exist. State action claims and actions against municipalities are already cognizable under 42 U.S.C. §1983. *Monell v. New York City Dept. of*

[8] *See* Br. for Petitioner at 20-23 nn.15-17 and n.1, *supra.* The Seventh Circuit has now definitively recognized that *Bivens* applies to claims arising under constitutional amendments other than the Fourth, including the Fifth Amendment Due Process Clause. Green v. Carlson, 581 F.2d 669 (7th Cir. 1978) (Fifth and Eighth Amendments), *petition for cert. filed,* 47 U.S.L.W. ___ (U.S. Feb. 13, 1979) (No. 78-1261); Chapman v. Pickett, 586 F.2d 22 (7th Cir. 1978) (First and Eighth Amendments). A petition for certiorari has also been filed in Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978), *sub nom.* Moffitt v. Loe, 47 U.S.L.W. ___ (U.S. Feb. 13, 1979) (No. 78-1260). Both petitions raise the question whether a *Bivens* cause of action should be implied where the Federal Tort Claims Act provides an alternative and effective remedy; they do not question whether *Bivens* should be applied where no other remedy exists. *See* Carlson v. Green, Pet. for Certiorari at 14.

[9] The en banc majority premised its concern over floodgates upon its perception of the vast sweep of the Fifth Amendment Due Process Clause. (A. 54-55, 56-57.) Should this Court choose to recognize plaintiff's *Bivens* cause of action on narrower grounds, a limiting principle is suggested by the American Civil Liberties Union *amicus curiae.* Plaintiff's equality-based claim can be fully addressed here without reference to procedural due process or substantive due process

(continued)

Social Services, 436 U.S. 658 (1978).[10] The courts have successfully handled *Bivens* causes of action for violation by federal agents of any number of constitutional protections. Thus, the only potential new "flood" of cases would be those presenting fact situations exactly analogous to that of plaintiff. It cannot be presumed that federal legislators regularly violate the constitutional rights of their employees. To the extent that they do, the possibility of a *Bivens* cause of action might well act as a deterrent.

Defendant's argument is erroneous in another respect. Defendant, relying on Mr. Justice Rehnquist's dissenting opinion in *Butz v. Economou,* 98 S. Ct. 2894, 2921 (1978), cites the increase in suits brought under *civil rights*

(footnote continued from preceding page)
claims that may be raised by other plaintiffs in other cases. Br. of the American Civil Liberties Union *Amicus Curiae* at 8 & n.8; 26 & n.20.

[10]This Court's decision in *Monell* destroyed the rationale of the First Circuit in Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977), in which that court — the only court of appeals except the lower court below to refuse to apply *Bivens* outside the Fourth Amendment — declined to imply a cause of action under the Fourteenth Amendment against a municipality sued on a vicarious liability theory. A statutory remedy under 42 U.S.C. §1983 existed against those persons directly responsible for plaintiff's injuries, and the First Circuit rested its decision on the adequacy of that remedy. *See* Br. for Petitioner at 23 n.17.

Petitioner notes that Turpin v. Mailet, 579 F.2d 152 (2d Cir. 1978) (en banc), has been vacated and remanded *sub nom.* City of West Haven v. Turpin for further consideration in light of *Monell.* 99 S. Ct. 554 (1978). This action and the similar remand of Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977), vacated and remanded for further consideration in light of *Monell,* 98 S. Ct. 3118 (1978), have no bearing on the rationale of those circuits in implying *Bivens* causes of action. *See* Owen v. City of Independence, Nos. 76-1758, 76-1799 (8th Cir. Dec. 1, 1978) (Slip Op. at 1) (Opinion on Remand). Indeed, both circuits have applied *Bivens* beyond the Fourth Amendment to cases not involving municipalities or have indicated their willingness to do so. *See* Br. for Petitioner at 20-23 nn.15-17; A. 70-72 n.6. Certiorari was granted in Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1978), *sub nom.* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 436 U.S. 943 (1978), not on the *Bivens* issue — as defendant implies, Br. for Respondent at 10 & n.5 — but rather on immunity questions not presented here.

statutes in the years 1961 to 1977 and urges that those statistics warrant foreclosing the *Bivens* remedy. Br. for Respondent at 15. This inquiry entirely misses the point. First, plaintiff's case is brought under the Constitution, not under any civil rights statute. Second, if one wishes to gauge the effect upon the federal judiciary of suits brought under implied constitutional causes of action, only the period after the *Bivens* decision in 1971 can appropriately be included. Neither consideration is reflected in the statistics cited by defendant.

Moreover, there is no factual support for defendant's assertion that the caseload of the federal judiciary can be expected to increase. The 1978 Annual Report of the Director of the Administrative Office of the United States Courts, published August, 1978, demonstrates that cases brought under civil rights statutes *declined* in 1978 by 2.2% from the previous year, with filings involving employment showing a 7.2% decrease. *Id.* at Table 18 and pp. 61, 83. Neither as a matter of theory, then, nor as a matter of fact, should the specter of "floodgates" cause this Court to hesitate in permitting plaintiff to proceed.

2. Recognizing Plaintiff's Cause Of Action Arising Under The Fifth Amendment Will Not Inhibit Federal Legislators Any More Than The Availability Of A *Bivens* Cause Of Action Arising Under The Fourth Amendment Has Inhibited Other Federal Officials Or The Availability Of A Statutory Cause Of Action Under 42 U.S.C. §1983 Has Inhibited State Officials.

Plaintiff's suit in no way attempts to limit or inhibit the legitimate actions of federal legislators, but rather seeks only to ensure that, if constitutional rights are violated, a forum for their remedy exists. Defendant has raised all the

horribles traditionally paraded any time the action of one coordinate branch arguably impacts the activities of another. Br. for Respondent at 16-17. His argument fails to acknowledge, however, the protection enjoyed by members of Congress under the Speech or Debate Clause — a protection unique to that Branch. It is only for those unconstitutional actions that lie outside the ambit of the Speech or Debate Clause that a member might be subject to liability.[11]

It is error to suggest that legislators' supposed "risk of bankruptcy" and "fear of large money judgments," Br. for Respondent at 16, 17,[12] can be balanced against plaintiff's Fifth Amendment rights. Thus, defendant's contention does not counsel hesitation to recognize plaintiff's cause of action here. Moreover, a bar to liability is provided by the Speech or Debate Clause where it applies. *See* Br. for Petitioner at 50-62 and pp. 20-24, *infra*. Congress can also provide an alternative but equally effective remedial mechanism for the redress of injury to its employees' constitutional rights. *Bivens, supra*, 403 U.S. at 397; *Brown v. General Services Administration*, 425 U.S. 820

[11]Defendant quotes the dissenting opinion of Mr. Justice Rehnquist in Butz v. Economou, *supra*, to support the proposition that granting plaintiff a cause of action will discourage both "federal action" and "even federal employment." Br. for Respondent at 16. Defendant fails to mention that that point was thoroughly considered and rejected by the *Butz* majority. Butz v. Economou, *supra*, 98 S. Ct. at 2911 & n.35. More importantly, he also fails to consider the differences between federal legislators and federal executives for these purposes. Justice Rehnquist's concerns were raised in the context of determining whether federal officials enjoy absolute rather than qualified immunity. If the former, suit is barred; if the latter, the official must mount a good faith defense at trial. Because a legislator enjoys the absolute immunity of the Speech or Debate Clause for activities falling within its ambit, the time and expense concerns raised by defendant will arise, if ever, only in those instances where a claim arises outside its sphere.

[12]Of course, very few members of Congress can be expected to discriminate and accordingly very few money judgments should ensue.

(1976). What Congress cannot do is deny plaintiff all remedies for violation of her constitutional rights when the absolute immunity provided by the Speech or Debate Clause is inapplicable.

Suits have proceeded under 42 U.S.C. §1983 against state officials since 1871 and against federal officials under the authority of *Bivens* since 1971. There is no evidence that state or federal officials have been less vigorous in performance of their duties because they can be sued for money damages. The harassment defendant fears can occur regardless of the filing of a lawsuit. The formality of a complaint filed in court will have no greater impact than a complaint aired on television or in the newspapers and will not of itself lose an election for a member of Congress charged with unconstitutional behavior. The governing assumption, in any event, is that the public's elected representatives will support and defend the Constitution. Plaintiff's lawsuit affects only those very few who do not.

3. The Silence Of Congress In Amending Title VII Of The Civil Rights Act Of 1964 Can Neither Be Construed As An "Affirmative Action" Counselling Hesitation Nor An "Explicit Declaration" That Plaintiff May Not Redress Injury To Her Constitutional Rights By An Implied Cause Of Action Under The Fifth Amendment.

Plaintiff has already addressed the error committed by the court below when it relied heavily on the fact that, in amending Title VII of the Civil Rights Act, Congress did not provide a statutory remedy for noncompetitive congressional employees, and concluded that Congress intended such persons to be remitted to no remedy

whatever. Br. for Petitioner at 41-45. Defendant builds upon the lower court's error, looking to the legislative history of the 1972 amendments to that Act and to this Court's decision in *Brown v. General Services Administration*, 425 U.S. 820 (1976), and drawing sweeping and erroneous conclusions. Br. for Respondent at 17-21.

The policy of the United States with respect to discrimination in employment by members of Congress is affirmatively stated in 5 U.S.C. § 7151. Plaintiff submits that this is precisely the kind of "explicit declaration" the *Bivens* Court would have looked to. Rather than counselling hesitation, however, this declaration urges implication of a cause of action here.

Brown v. General Services Administration, supra, held nothing to the contrary. In deciding whether Title VII provided the exclusive individual remedy available to a federal employee alleging racial discrimination in employment, the *Brown* court acknowledged that "[a]lthough federal employment discrimination *clearly violated both the Constitution, Bolling v. Sharpe,* 347 U.S. 497 (1954), *and statutory law, 5 U.S.C. § 7151,* before passage of the 1972 Act, the effective availability of either administrative or judicial relief was far from sure." *Brown, supra,* 425 U.S. at 825. (Emphasis added.)[13] The *Brown* Court tacitly admitted that Congress was incorrect in believing that judicial relief was unavailable to federal employees treated

[13]It must be emphasized that the reasons advanced for "doubt" went to the availability of the sovereign immunity defense. *Brown, supra,* 425 U.S. at 825-27 & n.8 Of course, there was no court decision directly on point. Because this is a suit against an individual, rather than the United States, sovereign immunity is inapposite.

discriminatorily. 425 U.S. at 828.[14] However, in deciding the narrow question presented, the Court considered important "not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Id.*

Plaintiff does not challenge the conclusion of *Brown* that Title VII is preemptive and exclusive where it applies. But Title VII does not apply to plaintiff. And the Court in *Brown* did not rule whether a cause of action was implied under either the Constitution or 5 U.S.C. § 7151 when it noted that discrimination in federal employment violated both. The legislative history of the 1972 amendments to Title VII is silent as to noncompetitive congressional employees. Neither the silence of the legislative history, nor the silence of the Act itself, can properly be interpreted to mean that Congress intended that its employees should have no remedy for violation of their right to be free of unconstitutional discrimination in employment.[15]

[14]The dissenting opinion is unequivocal that "Congress incorrectly assumed that federal employees would have no judicial remedy if §717 had not been enacted . . ." Brown v. General Services Administration, *supra,* 425 U.S. at 837 (Stevens and Brennan, J.J., dissenting).

[15]Such a result would itself be unconstitutional and would subvert the mandate of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), to the federal judiciary. Congress may not deny all remedies to a federal litigant by divesting the judiciary of the power to adjudicate the merits of a constitutional case properly within its subject matter jurisdiction. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856); Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,* 66 Harv. L. Rev. 1362, 1366, 1399 (1953); Br. of the American Civil Liberties Union *Amicus Curiae* at 10-11, 13-17.

4. The Implication Of A Cause Of Action Here Does No Violence To The Doctrine Of Separation Of Powers.

Relying on the formulations of *Baker v. Carr,* 369 U.S. 186 (1962), for determining political questions, defendant now urges a proposition raised only in his petition for rehearing en banc: that permitting petitioner to pursue a judicial remedy against a member of Congress for unconstitutional sex discrimination in employment violates the doctrine of separation of powers. Br. for Respondent at 21-23. Plaintiff has anticipated and addressed this contention in her opening brief. *See* Br. for Petitioner at 62-66.

Separation of powers is expressly ensured by operation of the Speech or Debate Clause. *United States v. Johnson,* 383 U.S. 169, 178 (1966); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 502 (1975); *Kilbourn v. Thompson,* 103 U.S. 168, 190-200 (1880). That Clause does not confer immunity on defendant here. *See* Br. for Petitioner at 50-62, and pp. 20-24, *infra.* Since defendant's activities fall outside the protection constitutionally mandated for legislators, there is no reason for this Court to abstain from recognizing plaintiff's cause of action. "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney v. Brandhove,* 341 U.S. 367, 377 (1951) (citations omitted).

The separation of powers doctrine governs the relationship of the judiciary with the other institutions — not that of the judiciary with an individual.[16] Petitioner asks this Court

[16]Defendant argues that members of Congress are better equipped to make judgments about proper performance of their staff than is the judiciary. Br. for Respondent at 21 n.16. Performance is not the issue here. Defendant admits plaintiff is an "extremely capable secretary." *(continued)*

to do no more than perform its traditional and special function — interpreting the Constitution. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). As this Court held in *Powell v. McCormack,* 395 U.S. 486 (1969) — a case involving far greater intrusion into the affairs of the legislature than does the instant case, which merely probes the employment practices of one legislator — separation of powers considerations do not bar plaintiff's suit:

> ". . . [A]s our interpretation of Art. I, §5, discloses, a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government,' nor does it involve an 'initial policy determination of a kind clearly for nonjudicial discretion.' *Baker v. Carr,* 369 U.S. 186, at 217. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that

(footnote continued from preceding page)

(A. 6.) At issue is whether the judiciary can determine whether the criterion of sex was unconstitutionally brought to bear in the employment relationship. *Cf.* Powell v. McCormack, 395 U.S. 486 (1969) (reiterating the *Baker* formulations and holding that Art. 1, § 5, providing that the House of Representatives was to "be the judge of the qualifications of its own members," did not bar judicial review of the exclusion of Representative Powell on political question grounds); Bond v. Floyd, 385 U.S. 116 (1966) (this Court may determine whether Georgia House of Representatives' disqualification of Representative Bond violated his First Amendment rights); United States v. Helstoski, 576 F.2d 511, 518-19 (3d Cir.) *cert. granted,* 99 S. Ct. 719 (1978) (No. 78-349) (separation of powers, supporting speech or debate immunity, no bar to trying and convicting congressman on indictment; issue not raised on certiorari).

such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack, supra,* 395 U.S. at 548-49 (footnote and citations omitted).

The issue here is a constitutional one. Petitioner requests redress for violation of her Fifth Amendment rights. The remedy sought, as in *Bivens,* is money damages. Contrary to defendant's contentions, *see* Br. for Respondent at 22, this case does not present questions regarding the authority of the court to impose equitable remedies arguably analogous to those available under Title VII. The same considerations advanced by defendant regarding judicial "examination" of the legislature existed in *Bivens* regarding judicial scrutiny of the actions of the Executive Branch. This Court did not prohibit the recovery of damages from executive officials, although review of their activities by federal judges is required. Similarly, this Court should not prohibit the recovery of damages from federal legislators where the Speech or Debate Clause provides no immunity from liability.[17]

5. The Speech Or Debate Clause Is Not A Special Factor Counselling Hesitation.

Defendant only obfuscates the issues when he argues that the "existence of the Speech or Debate Clause itself is a special factor in this case warranting hesitation in the expansion of *Bivens.*" Br. for Respondent at 23.

[17]Title VII also permits the kind of judicial "interference" with the "internal workings" of the Executive Branch for statutorily proscribed employment discrimination that would be required in the instant case in the constitutional framework. There is no evidence that the "harassment" and "dictation" to a coordinate branch augured by defendant have materialized in that context.

The question whether plaintiff has a cause of action cognizable in federal court under 28 U.S.C. § 1331(a) jurisdiction is distinct from the question whether defendant, as a member of Congress, is absolutely immune from liability by virtue of the operation of the Speech or Debate Clause.[18] The Speech or Debate Clause ensures the guarantee of separation of powers, *United States v. Johnson,* 383 U.S. 169, 178 (1966), and provides absolute immunity for actions of members of Congress that fall within the "sphere of legitimate legislative activity." *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). Plaintiff has never argued to the contrary. Rather, in the context of defendant's attempt to invoke the immunity conferred by the Clause, plaintiff has argued that his actions are outside the scope of its protection as interpreted by this Court.[19] Br.

[18]The cause of action sought here presumptively would be available to any congressional employee who could allege a violation of constitutional rights. The immunity provided by the Speech or Debate Clause, however, would operate to bar (1) those lawsuits where the act complained of was within the legislative sphere, regardless whether an individual's constitutional rights were in fact violated, and (2) those lawsuits where the functions of the employee involved were such as to make that individual an alter ego of the member of Congress. Neither situation is present here.

[19]Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972); United States v. Brewster, 408 U.S. 501 (1972); Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); Kilbourn v. Thompson, 103 U.S. 168 (1880).

Since plaintiff's opening brief was submitted, this Court has granted certiorari in two cases which also require delineation of the parameters of the Speech or Debate Clause. Hutchinson v. Proximire, 579 F.2d 1027 (7th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3463 (U.S. Jan. 8, 1979) (No. 78-680); United States v. Helstoski, 576 F.2d 511 (3rd Cir.) *cert. granted,* 99 S. Ct. 719 (1978) (No. 78-349). Both cases involve actions of congressmen arguably more "essential to legislating" than is defendant's conduct here.

for Petitioner at 50-62 and pp. 20-24, *infra*. The fact that *some* actions of a congressman — including those respecting the employment of *some* congressional aides — are insulated from judicial review has no bearing on the question whether plaintiff should be permitted access to the federal courts.[20]

II.

THE SPEECH OR DEBATE CLAUSE DOES NOT PROVIDE IMMUNITY TO DEFENDANT FROM LIABILITY FOR UNCONSTITUTIONAL SEX DISCRIMINATION ON THESE FACTS.

In arguing that the Speech or Debate Clause provides "absolute immunity from judicial inquiry into the hiring and firing of personal staff employees," Br. for Respondent at 25-34, defendant urges an interpretation of the Clause never articulated by this Court. Moreover, in requesting this sweeping reading and in arguing, *inter alia*, that his conduct in the case at bar is protected by the Clause, defendant strays from the facts in several material respects.

Plaintiff performed ably and efficiently in her employment by defendant. Defendant commended plaintiff as "able," "energetic," "command[ing] the respect of those with whom you work," "talent[ed]," experience[d]," and an "extremely capable secretary." (A. 6.) Defendant

[20]If anything, defendant's argument urges the reverse interpretation. Because the Speech or Debate Clause provides no immunity to defendant on the facts of this case, it can accordingly counsel no hesitation in implying a cause of action here.

cannot now contend that he was impeded in his ability to assemble an effective staff, or that plaintiff failed adequately to assist him in performing his legislative functions. Br. for Respondent at 28. To the contrary, defendant has stated that "the contribution [of plaintiff] to [defendant's] Washington Office . . . helped all of us," including the "humble Congressman." (A. 7.)[21]

The nature of plaintiff's responsibilities is "critical," *Elrod v. Burns*, 427 U.S. 347, 367 (1976), to a determination whether defendant should be entitled to absolute immunity for all actions — even unconstitutional sex discrimination — with respect to the employment relationship. Defendant correctly cites *Gravel v. United States*, 408 U.S. 606, 617 (1972), for the proposition that an aide acting as the alter ego of the member is entitled to speech or debate protection for activities which, if performed by the member, would be so protected.[22] Defendant then argues that because the member and his aide are both cloaked by legislative immunity in this context, their entire employment relationship must be immune from judicial review. Br. for Respondent at 31. This contention is erroneous. The scope of the immunity accorded the employment relationship can be no greater than the scope of the immunity accorded to a congressional employee by *Gravel*. Defendant departs from the holding of *Gravel* in urging speech or debate protection for his actions here.

[21]These assessments, for purposes of the present proceeding, must be taken as true.

[22]Plaintiff does not contest the wisdom of extending the speech or debate privilege to high level staff members in policy-making positions, such as legislative aides, Gravel v. United States, 408 U.S. 606 (1972), or committee counsel, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), where the activities of the member and the employee are not distinguishable. Plaintiff, however, was described by defendant as a "secretary." (A. 6,7).

Defendant has never before suggested that plaintiff stood "in his place, in his shoes, as his alter ego in Congress." Br. for Respondent at 32. Nor could he. Defendant's letter of termination spoke only of plaintiff's ability as an "extremely capable secretary." (A. 6,7.)[23] And his brief to this Court, with its extraordinary insistence that in typing

[23]Defendant implies that plaintiff's salary ($18,000 annually, with expectation of promotion to $32,000 annually) and title suggest that her job functions were of a level higher than secretarial. Br. for Respondent at 29 n.25. This inference is belied by his own letter of dismissal. Defendant worried that a secretary of such "talent and experience" would be "waste[d]" at his Monroe office because of the "low salary" available. This concern was advanced twice, and defendant also offered letters of recommendation so that plaintiff could seek employment with organizations that could take advantage of a "secretary with [her] ability." (A. 6,7.)

Defendant's implication is also belied by the Report of the Clerk of the House from January 1, 1974 to June 30, 1974, H.R. Doc. No. 340, 93d Cong., 2d Sess. (1974) ("Report"), listing salaries paid by job title to each employee of a member of Congress during the period. At least seventy-five *other* representatives had a "secretary," "executive secretary," "personal secretary," or "office manager" earning $9,000 or more semiannually ($18,000 annually); twelve of these members had more than one in that job description and that salary bracket. Report at 3-152. Another thirty-three members had at least one such employee earning more than $8,000 semiannually. Report at 3-152. Additionally, five members had a "secretary" or an "executive secretary" earning more than $16,000 semiannually ($32,000 annually), and two others had such employees earning more than $15,000 seminannually. Offices of Honorables Albert, Bolling, Flood, Herbert, Widnall. Report at 4, 15, 49, 64, 144; Offices of Honorables Boggs, Jarman. Report at 14, 72. Finally, six members had at least one "secretary," "personal secretary," or "executive secretary" earning a salary comparable to or more than his "administrative assistant." Offices of Honorables Bolling, Fisher, Flood, Herbert, M. Murphy, Nichols. Report at 15, 48, 49, 64, 98, 100. Plaintiff's salary, whether received or anticipated, was thus no different from that paid many other secretarial employees of members of Congress at that time.

and taking dictation a secretary is engaged in legislative activities, Br. for Respondent at 28-29, is tacit acknowledgment that those were precisely the roles performed by plaintiff. There is no plausible interpretation of these facts that would render plaintiff the surrogate of defendant,[24] and accordingly no interpretation of the Clause that would render defendant immune from suit for his unconstitutional sex discrimination in firing plaintiff.

The interpretation of the Clause urged by defendant would make it applicable to *every* action of a congressman, no matter how remote to legislating, and would protect his *every* activity in regard to *every* congressional employee. It would immunize the congressman from suit for failure to pay federal income tax, suit for default on a mortgage or execution of a contract, suit for personal injury attendant to an automobile accident, and prosecution for assault and battery. Any of these legal actions would impact against the legislative function since they consume the legislator's time and resources. But it has never been suggested that a legislator can escape all legal responsibility. *Gravel v. United States, supra,* 408 U.S. at 615; *Butz v. Economou,* 98 S. Ct. 2894, 2910-11 (1978), *citing United States v. Lee,* 106 U.S. 196, 220 (1882); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *Scheuer v. Rhodes,* 416 U.S. 232, 239-40 (1974). *See United States v. Brewster,* 408 U.S. 501 (1972). Defendant's interpretation of the Clause also would, under the same logic, protect all congressional staff from all lawsuits, for defendant does not link the

[24]*And see* Powell v. McCormack, 395 U.S. 486 (1969); Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1880), holding legislative employees liable for their activities regardless of the immunity accorded the member of Congress.

immunity to performance of "legislative" or policymaking functions.[25] In effect, defendant asks this Court to overrule all its prior decisions that limit the breadth of the Speech or Debate Clause.[26]

The contentions of defendant not only rob the Speech or Debate Clause of all meaning but also offer nothing to distinguish this case from one involving any employer and one of his several secretarial employees. The rapport of a congressman with his clerical employees is no more "essential" than that required in many private sector jobs or even in those public sector jobs already covered by employment discrimination legislation. Indeed, defendant himself argues that "[i]ndividuals are hired and fired every day and the impact is the same regardless of whether the employer [is] governmental or private," and "[t]here is nothing inherent in government which makes an employment decision by a government official to discharge an individual have any greater effect on the discharge merely because the employer [is] the government." Br. for Respondent at 11.

The policy of the United States, express and implied, is to discourage all forms of employment discrimination that intrude on statutorily or constitutionally protected interests like race or sex. Defendant advances no arguments that would warrant distinguishing his situation from others that are outside the scope of the Speech or Debate Clause as interpreted by this Court in its past decisions.

[25]This Court has upheld the validity of such distinctions in the context of patronage dismissals. Elrod v. Burns, 427 U.S. 347, 367, 372 (1976). *See* Br. for Petitioner at 58-59. In so doing, it has emphasized that the nature of job responsibilities, rather than job title, is "critical." *Id.* at 367.

[26]*See, e.g.,* Doe v. McMillan, 412 U.S. 306, 317 (1973) (Speech or Debate Clause has "finite limits"); Gravel v. United States, *supra,* 408 U.S. at 621, 625 (protected activities must be "essential to legislating" and an "integral part" of the legislative process); United States v. Brewster, *supra,* 408 U.S. at 516 (privilege does not include "all things in any way related to the legislative process").

CONCLUSION

For all the foregoing reasons, as well as those stated in plaintiff's opening brief, the judgment of the court of appeals should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

SANA F. SHTASEL
PETER BARTON HUTT
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:
JEFFREY S. BERLIN
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006